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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. ——

CIVIL AERONAUTICS BOARD, PETITIONER

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES; THE UNITED STATES OF AMERICA, ON BEHALF OF THE POSTMASTER GENERAL; AND WESTERN AIR LINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Civil Aeronautics Board respectfully prays that a writ of certiorari be issued to review that portion of the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled consolidated case on May 4, 1953, which reversed in part the order of the Civil Aeronautics Board under review.

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 341) is not yet reported. The orders and findings of the Civil Aeronautics Board (R. 183, 258, 333) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1953 (R. 354). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Whether, after having approved the purchase price to be paid by an air carrier for one of the air routes of another as being in the public interest because the profit to the selling carrier would provide the incentive for the sale, the Civil Aeronautics Board, in fixing a "fair and reasonable" need mail rate for the selling carrier, was required by Section 406 of the Civil Aeronautics Act to reduce, by the amount of profit attributable to the sale of the route, the mail pay allowance to which the carrier otherwise was entitled.

2. Whether the provisions of Section 406 of the Civil Aeronautics Act preclude the Civil Aeronautics Board from declining, as a matter of regulatory policy and for the purpose of encouraging voluntary route transfers deemed necessary in the public interest, to reduce need mail rates otherwise "fair and reasonable" by the amount of profits derived from route sales.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act, which will be referred to as the Act, are set forth in the Appendix, *infra,* pp. 16–18.

STATEMENT

This case arises out of a proceeding before the Civil Aeronautics Board in which a final air mail rate was fixed for Western Air Lines, Inc. for the past period May 1, 1944–December 31, 1948. Both the Postmaster General and Western were parties to the Board's proceeding, and both sought review of the Board's order. The petitions for review were consolidated for hearing and decision by the Court of Appeals (R. 355), and a single opinion and judgment was entered (R. 341, 354). The Court of Appeals affirmed the Board's order insofar as it was challenged by Western (Case No. 11324 below), and reversed the order in part upon the basis of the challenge made by the Postmaster General (Case No. 11259 below). The facts pertinent to this petition and the partial reversal of the Board's order follow.[1]

In 1947, Western entered into a contract with United Air Lines for the sale, at a profit in excess of $1,000,000, of Western's certificate and properties for air operations between Los Angeles and Denver (Route 68). After imposing appropriate conditions to insure that the portion of the purchase price paid by United in excess of the actual value of the physical assets would not

[1] Western also has filed a petition for the issuance of a writ of certiorari to review the judgment below. *Western Air Lines, Inc.* v. *Summerfield et al. and the Civil Aeronautics Board*, this term.

be recouped by United from either the public o the Government, the Board approved the sal *United-Western, Acquisition of Air Carrie Property,* 8 C. A. B. 298. As stated by the Cou of Appeals (R. 343):

> The Board decided that the transfer o the route at the amount to be paid b United was in the public interest, becaus the profit on the transaction would provid the necessary incentive for Western t make a sale and the purchasing carrie could operate the property to greater ad vantage to the public. The Board acte upon the premise that it has no power t force a carrier against its will to transfe property to another carrier; its only powe to influence such transfers is the powe of inducement. It decided that a profi on a sale would be such an inducement Hence it approved the sale.

At the time of the approval of the sale, West ern was conducting operations under a temporar "need" or subsidy mail rate (R. 44), havin petitioned the Board in April, 1944 for the fixin of a need rate to be made effective from May 1 1944 (R. 15). Subsequently, on December 30 1948, the Board proposed a final lump sum nee payment for operations over Western's entir air carrier system for the past period May 1 1944–December 31, 1948, and a need rate for th future (R. 54). Only the lump sum payment fo the past period is here in issue.

Section 406 (b) of the Act (*infra*, p. 18) provides in part that, in fixing "fair and reasonable" mail rates, the Board "shall take into consideration, among other factors," the "need" of the carrier for mail compensation, which, "together with all other revenue of the air carrier," will enable the carrier to "maintain and continue the development of air transportation." The Board determined that the entire profit from the route transfer constituted "other revenue" within the statutory meaning of the term, and could be used to reduce the carrier's mail pay allowance (R. 261). The Board stated, however (R. 262):

> While we are required by the Act to "take into consideration" the "need" of the carrier for mail compensation together with "all other revenue," we do not understand the language of section 406 (b) as requiring us to reduce the carrier's mail pay need with any part of such "other revenue." This is a matter within our discretion. That is, we may take in "other revenue" in whole, in part, or not at all. However, we will normally use "other revenue" as available to reduce need unless there are exceptional and compelling circumstances which dictate otherwise."

The Board had first determined to reduce the mail pay allowance by the entire profits from the transaction (R. 200). On reconsideration, the Board found that there were exceptional and compelling circumstances which required that the

carrier be permitted to retain a part of the profits. In making this determination, the Boa found (R. 263) that any other course of acti would, in effect, override the considerations whi had prompted the Board's opinion and action previously approving the sale at a profit, a would destroy the profit incentive for need ca riers to effectuate route transfers necessary f the improvement of the air route pattern. T Board reduced the mail compensation by t profit derived from the sale of tangible asse aircraft and the like, fixed at $652,000 (R. 26 279). It declined to reduce the mail pay allo ance by the profit realized from the sale of t "intangible value" of the route. Western w permitted to keep this amount, fixed at $447,0 (R. 279), because the profit on the sale of t earning power of the route was the "factor whi played the decisive part in the route transfer (R. 264). The Board concluded (R. 265)

> * * * it should again be emphasized tha our decision not to include the net prof from the sale of the intangibles was reache solely because we are thus seeking to en courage improvement of the air route pa tern through voluntary route transfers b other air carriers.[2]

[2] After considering and excluding the $447,000 profit o the sale of the intangibles, the Board determined the "breal even need" of the carrier, i. e., the amount of money nece sary to equalize income and outgo, to be $2,537,898 (R. 22 279, 337). Return on investment at 7% was determined t

The Court of Appeals affirmed, against Western's challenge, the Board's determination that the profits from the sale of Route 68 constituted "other revenue" to Western which could be used to reduce the mail pay allowance (R. 348). The Court further held, in response to the Postmaster General's petition, that the Board mandatorily was required to reduce the carrier's mail pay by the entire profit from the sale (R. 350).

In so holding, the Court stated (R. 344) that "[t]he statute says that the carrier should receive the amount needed not only to insure the performance of the service but also to enable it to continue the development of air transportation." The Court recognized that "[a]llowances designed as developmental incentives for the utility whose rates are being determined are quite common in public utility rate-making" (R. 350). These developmental allowances permitted under traditional rate-making principles and by the Civil Aeronautics Act, said the Court, are restricted "to the need of each individual carrier to maintain and continue a development program of its own" (R. 349, 350). It held that the Board's determination not to offset the profit from the sale

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be $1,375,168 (R. 229, 247, 251, 279, 337). The amount necessary to satisfy actual tax liability on items recognized for mail rate purposes, $4,295, also was provided (R. 337). Thus total mail pay for the period was allowed in the amount of $3,917,361 (R. 339). The carrier already had received temporary mail pay of $4,252,000, and a refund was due of $334,639 (R. 337).

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of the intangibles was for the purpose of encouraging "other carriers (not Western) to follow a given course of action" (R. 348, 349). It concluded that the statute, and a prior decision by this Court holding that the mail rate provisions describe a traditional rate-making authority,[3] leave "no room for bonus subsidies not connected with the particular carrier's own need" (R. 350). Accordingly, it ordered a remand to the Board for the fixing of a new rate by deducting the entire profit from the route sale (R. 352).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In holding that the Board's action in permitting Western to retain the portion of the profit from the route sale which the Board previously had approved as a necessary incentive to the sale had no relation to Western's action in transferring the route or to Western's own developmental program.

(2) In holding that mail pay allowances to a given air carrier for the purpose of providing industry developmental incentive have no relation to that carrier's own developmental program.

(3) In construing Section 406 of the Civil Aeronautics Act in such manner as to restrict developmental mail pay allowances to situations in which those allowances are required for the pur-

[3] *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U. S. 601.

pose of aiding and encouraging operations and activities which are to be continued by the carrier.

(4) In holding that Section 406 of the Civil Aeronautics Act mandatorily requires the Board to reduce mail rates otherwise "fair and reasonable" by offsetting, as "other revenue" against the "need" of air carriers for mail pay, profits derived from route sales.

(5) In failing to recognize and to hold that, in fixing "fair and reasonable" mail rates, the Board has sound discretionary authority under Section 406 to refuse in appropriate cases, for reasons of regulatory policy, to offset certain categories of "other revenue" against the "need" of air carriers for mail pay allowances.

(6) In reversing the order of the Board.

REASONS FOR GRANTING THE WRIT

This case raises questions of importance in the administration of the Civil Aeronautics Act which have not been, but should be, passed upon by this Court. Although acknowledging the statutory authority of the Board to award subsidy mail pay for developmental and incentive purposes, the Court of Appeals unjustifiably has so construed the circumstances under which these allowances may be made as to seriously limit the powers conferred by Congress upon the Board to administer the mail pay provisions of the Act in such manner as to best develop a sound and

economically self-sufficient air transportation system.[4]

With the advent of larger and longer range aircraft after the cessation of hostilities in World War II, many changes in the air route pattern, designed largely for DC–3 and smaller aircraft, have become necessary for the purpose of developing sound and economically self-sufficient air carrier systems. Since most of the domestic trunkline carriers hold permanent certificates for their routes, and since the Board lacks statutory authority to compel route transfers and mergers, it must necessarily resort to persuasion and inducement to effectuate most of the desired route and carrier realignments. One such inducement is the Board's action in this case, that of permitting Western to retain the profit attributable to the sale of a route which could be operated to greater public advantage by another carrier, so that the entire industry may expect similar treatment and thus be motivated to enter into voluntary proposals for route transfers to be sub-

[4] The fact that Western happened to be conducting operations under a temporary rate at the time of the route sale is not believed to be of controlling significance to the decision below. Route sales, and sales of air carrier properties to another carrier, can be consummated only after Board approval (Sections 401 (i) and 408 of the Act, 49 U. S. C. 481 (i), 488). Both the Board and the Postmaster General are at liberty to institute new rate proceedings prior to the consummation of a particular sale so that any profits resulting therefrom may be used to reduce mail pay (Section 406 (a), *infra*, p. 17).

mitted for the approval of the Board both as to the transfer and the purchase price.

The Court of Appeals recognized the desirability of the Board's objective (R. 349), and it did not in terms deny the statutory authority of the Board to induce action such as a route transfer through permitting a carrier to retain a portion of the profit from the action. Rather, it appears to have upset the Board's order on the ground that the incentive in this case was not directed to Western, but to carriers other than Western. However, the circumstances of the case and the findings of the lower Court are such as to either effectively deny the discretionary authority of the Board to exclude certain types of "other revenue" in fixing need mail rates except where that action is for the purpose of aiding and encouraging operations and activities which are to be continued by the carrier, or to indicate that the Court erroneously applied the principles which it stated.

Western sold Route 68 because it was in need of cash to meet outstanding obligations and because from a long range standpoint operation of the route would not have been economically feasible by a regional carrier such as Western. *United-Western, Acquisition of Air Carrier Property,* 8 C. A. B. 298, 302, 303, 325. The record in the *Acquisition* case plainly discloses that the transfer of Route 68 was a step in Western's developmental program designed to enable it to con-

centrate on regional operations, rather than continuing its dual role as both a regional carrier and one participating in transcontinental operations. See 8 C. A. B. 298, 302, 303. The Court of Appeals found that the Board, in approving the purchase price of Route 68, did so "because the profit on the transaction would provide the necessary incentive to Western to make a sale" (R. 343). Yet the Court further found that permitting Western to retain a portion of that very profit which had induced the sale had no relation to Western's action or its own developmental program (R. 348, 349). We think it obvious that permitting Western to retain the specific sum of money here involved had a sufficient relation to Western's own situation to bring it within the rule enunciated by the Court. Equally obvious, we believe, is the fact that a policy determination not to offset a particular category of "other revenue" against a carrier's mail pay need, for the purpose of encouraging similar future action by that and other carriers, has relation to the developmental program of the carrier whose action evoked the policy.

If the Court of Appeals in reality was of the view that the authority of the Board to exclude certain types of "other revenue" in fixing mail rates is limited to situations in which that action is for the purpose of aiding and encouraging operations and activities which are to be continued by the carrier, we believe the decision to be

equally erroneous and of sufficient importance to warrant review by this Court. There is nothing in the decision in *Transcontinental & Western Air* v. *Civil Aeronautics Board,* 336 U. S. 601, or in the provisions of Section 406, which precludes the Board from excluding particular categories of other revenue in determining a carrier's mail rate for the purpose of inducing the transfer of air carrier properties and routes to carriers who can operate them to greater public advantage. We think that the statutory concept of need permits such action; the transferring carrier needs the allowance so that it will act for the "development of air transportation." (See Section 406 (b), *infra,* p. 18).

Further, the duty of the Board is to fix a "fair and reasonable" mail rate, and a rate which excludes certain categories of non-recurring capital gains does not become unreasonable as a matter of law simply because of that fact. "Need", and "other revenue" to be used in computing need, are merely factors which the Board is to "take into consideration, among other factors," in determining fair and reasonable rates. The other factors which the Board is required to take into account obviously include the developmental responsibilities placed upon the Board (See Section 2 of the Act, *infra,* p. 16). The Congress did not say that "all other revenue" must be offset against need for mail pay in all cases, or that the minimum amount necessary for continued opera-

tions always marks the limit of a fair and reasonable rate. It left to the Board the power and the duty to weigh and evaluate the various factors to be taken into account in fixing a fair and reasonable rate without binding the Board as to the part that its "consideration" of the individual factors shall play in the final determination. *cf. Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U. S. 604; *New York* v. *United States*, 331 U. S. 284, 345–349. The Court of Appeals has sharply, and we believe erroneously, limited this clear discretionary authority of the Board.[5]

[5] Judge Prettyman, who wrote the opinion in this case, dissented from the majority opinion in the companion case of *Summerfield et al v. Civil Aeronautics Board*, U. S. App. D. C., Case No. 11,351 (not yet reported), from which petitions for certiorari also are pending before this Court. He was there willing "to agree with the Board that the elastic statutory phrase 'take into consideration' is sufficiently flexible to permit the omission of domestic earnings from the foreign calculation [of need], even after such earnings are taken into consideration."

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

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I hereby authorize the filing of the foregoing petition for a writ of certiorari.

OSCAR H. DAVIS,
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APPENDIX

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,[1] are as follows:

Declaration of Policy

Sec. 2. In the exercise and performance of its powers and duties under this Act, the [Board] shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-

[1] Act of June 23, 1938, c. 601, 52 Stat. 973; Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 F. R. 2421, 54 Stat. 1235, 49 U. S. C. 401, et seq.

transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety, and

(f) The encouragement and development of civil aeronautics.

Rates for Transportation of Mail

Authority to fix rates

Sec. 406. (a) The [Board] is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

RATE-MAKING ELEMENTS

(b) In fixing and determining fair and reasonable rates of compensation under this section, the [Board], considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the [Board] shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

* * * * *

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